No. 332

# In the Supreme Court of the United States

October Term, 1955

Washington Public Service Commission;
Public Utilities Commissioner of Oregon;
Board of Railroad Commissioners of the State of Montana;
State Board of Equalization and Public Service Commission of Wyoming;
State of Nebraska and Nebraska State Railway Commission,

Appellants,

v.

The Denver and Rio Grande Western Railroad Company.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

## JURISDICTIONAL STATEMENT

BERT L. OVERCASH,
*Counsel of Record for Appellants,*
State Capitol Building,
Lincoln, Nebraska.

DON EASTVOLD,
ROBERT L. SIMPSON,
C. W. FERGUSON,
JAMES B. PATTEN,
GEORGE F. GUY,
CLARENCE S. BECK,
*Of Counsel.*

# INDEX

## INDEX—Continued



Statutes Cited:

## INDEX—Continued

# In the Supreme Court of the United States

October Term, 1955

No.————

Washington Public Service Commission;
Public Utilities Commissioner of Oregon;
Board of Railroad Commissioners of the State of Montana;
State Board of Equalization and Public Service Commission of Wyoming;
State of Nebraska and Nebraska State Railway Commission,

Appellants,

v.

The Denver and Rio Grande Western Railroad Company.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

---

## JURISDICTIONAL STATEMENT

---

### Opinion Below

The report of the Interstate Commerce Commission is found in 287 I. C. C. 611. The opinion of the United States District Court for the District of Colorado was filed January 13, 1955, and has not been reported, but is attached hereto as Appendix D. The opinion, by the court's order entered April 22, 1955, was "modified by

substituting for pages 14, 29, 31, 32 and 36 thereof" rewritten pages bearing the same numbers. Copy of that order and the rewritten pages are attached hereto as Appendix E. The court made no separate findings of fact or conclusions of law.

**Jurisdiction**

This action was brought in the United States District Court for the District of Colorado by The Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande") against the United States of America and the Interstate Commerce Commission, pursuant to 28 U. S. C. 1336, 1398, 2284 and 2321-2325, to enjoin, annul, suspend and set aside "in part" an alleged "order" issued January 12, 1953 (Appendix A hereto), by the Commission in a proceeding entitled "Docket No. 30297, Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co. et al." These appellants intervened as defendants in the district court.

The final judgment and decree of the district court, dated February 1, 1955, was entered February 14, 1955. On April 22, 1955, the district court entered an order overruling and denying a motion of these appellants and others for new trial or reargument and reconsideration. Copies of the final judgment and decree and the order entered April 22, 1955, denying that motion are attached hereto as Appendices B and C.

Notice of appeal was filed by these appellants in the United States District Court for the District of Colorado on June 20, 1955.

The jurisdiction of this Court to review the judgment by direct appeal is conferred by 28 U. S. C. 1253 and 2101(b).

The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *Edward Hines Trustees v. U. S.*, 263 U. S. 143; *Sprunt & Son v. United States*, 281 U. S. 249; *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479; *Moffat Tunnel League v. U. S.*, 289 U. S. 113; *United States v. Mo. Pac. R. Co.*, 278 U. S. 269; *U. S. v. Great Northern R. Co.*, 343 U. S. 562; *Thompson v. United States*, 343 U. S. 549; (see also *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538).

## Statutes Involved

This appeal involves the following provisions of the Interstate Commerce Act, Part I, 49 U. S. C. 1, *et seq.*, which are set out in Appendix F hereto:

National Transportation Policy (Preceding Section 1), and Sections 1(4), 3(4), 15(1), 15(3), 15(4), 15(8) and 20(11).

## Questions Presented

The following questions are presented by this appeal:

I. Does the Rio Grande, which obtained joint through rates on certain commodities under the Commission's order, have legal standing to seek by a suit to enjoin the order, similar rates on all commodities via all possible routes when the granting of such additional relief is subject to administrative determination of public interest requirements under the Interstate Commerce Act.

II. Did the district court err in holding that Rio Grande sustained "pecuniary injury" and had standing

to maintain this action on the ground that the Commission deprived Rio Grande of additional "pecuniary gain" which would be realized if all the joint rates demanded by Rio Grande had been granted.

III. Did the district court err in holding that Rio Grande need not sustain "pecuniary injury" in order to have a "right to judicial review".

IV. Did the district court err in holding that the Commission's finding that "there are at present no through routes, as that term is used in the act", over the Rio Grande via Ogden or Salt Lake City "on the traffic here concerned" is not supported by substantial evidence and is erroneous as a matter of law.

V. Did the district Court, in connection with its holding that through routes were in existence on the "bridge" traffic sought by Rio Grande, err in failing to consider and give effect to the fact that the primary objective of Rio Grande was to participate in the transportation of products from the northwest states to the eastern and southern markets and that not a single movement of such "bridge" traffic is shown to have occurred over the Rio Grande route.

VI. Did the district court, in connection with its holding that through routes were in existence, err in failing to find that the cancellation of joint rates in 1906 and 1912 effectively closed these through routes in accordance with the understanding and "course of business" of the parties concerned and that the conclusion of the Commission in this regard is supported by legislative amendments in 1940 to section 15(3) of the act.

VII. Did the district court, in connection with its holding that through routes were in existence, err in failing to find as the Commission found, that shippers have a right to route traffic via the Rio Grande and Union Pacific at combination of local rates and that the Union Pacific had no right or duty to refuse shipments.

VIII. Did the district court err in holding that the decision of the Commission as to the existence of through routes "obviously prejudiced the entire proceeding" in view of the fact that the Commission's order established through routes and joint rates upon all commodities that it considered upon the evidence to be necessary in the public interest.

IX. Did the district court err in annulling and setting aside only that portion of the Commission's order which "denied relief to the Rio Grande" upon its holding that the Commission's finding as to through routes "obviously prejudiced the entire proceeding".

X. Did the district court err and exceed its powers in making findings of fact favorable to Rio Grande and in ordering the Commission to proceed "in conformity with the opinion and judgment of the court", and the "instructions" therein.

## Statement

The Rio Grande's complaint to the Commission demanded that joint rates, in lieu of the present combination of local rates, be established via its line "the same" as joint rates maintained over shorter through routes by the Union Pacific and other defendant railroads named in the complaint for about 172,000 carloads of traffic.

moved annually by those railroads for more than 75 years between points in the northwest area and points in the eastern and southern parts of the country described in the order. The combination rates via the Rio Grande are substantially higher than the joint rates maintained over Union Pacific routes. The Rio Grande's President testified that its purpose in filing the complaint was to improve its financial condition by diverting this traffic from Union Pacific routes for a "bridge" haul over its line.

The order issued by the Commission requires that the Union Pacific and over 200 other railroads establish through routes and joint rates in connection with the Rio Grande "the same" as the joint rates maintained by them on the several commodities named in the order, which comprise about 57,000 carloads, or one-third of the traffic annually that the Rio Grande seeks to divert over its line, short-hauling the Union Pacific routes at least 925 miles and subjecting the Union Pacific and other lines to large revenue losses.[1]

But the Commission did not order through routes and joint rates on about two-thirds of the traffic, and it is for the purpose of having the Commission order through routes and joint rates via its line on the remaining two-thirds of the traffic, that the Rio Grande brought this suit to enjoin and annul the Commission's *failure* to include the remaining two-thirds of the traffic in the order it issued. Such failure is not embraced in the order issued or in any "order" of the Commission.

---

[1] The validity of the order issued is now before this Court in Nos. 117, 118, and 119, appeals docketed May 31, 1955, from the final decree of the United States District Court for the District of Nebraska.

The case presents the novel and unique situation of an admitted attempt by the Rio Grande through judicial proceedings to further enhance its financial gains by diverting to its longer line for a "bridge" haul, traffic that originates or terminates on the railroads that have the shortest, fastest and most efficient routes and lowest rates between the points at which the traffic originates and points of its destination.

The Rio Grande contended before the Commission that through routes at the combination or sum of local rates already existed via its line for the traffic it seeks, and that the short-hauling prohibition in Section 15(4) was not applicable. It demanded that the lower joint rates maintained over the existing Union Pacific routes be made applicable via its line, and contended that refusal of the defendants named in its complaint to make the joint rates applicable via its line discriminated against it. The Commission held that through routes via the Rio Grande did not exist for the involved traffic but found they were necessary in the public interest to provide adequate and more economic transportation for certain commodities named in the order, and required that joint rates "the same" as maintained over existing Union Pacific routes be made applicable via the Rio Grande to those commodities. The Commission found that the evidence failed to prove the alleged discrimination against the Rio Grande and concluded that, except as indicated in its findings, "the allegations made in the complaint are not sustained." The order issued does not, in terms, deny or withhold anything, nor does it make any reference to the remaining two-thirds of the traffic the Rio Grande seeks by this suit to divert to its line.

The district court overruled a motion to dismiss the case on the ground that, as the Rio Grande admittedly has no legal or other right to the traffic it seeks to divert to its line for its financial gain, it has no standing to maintain the suit. The court reversed the Commission and held that through routes via the Rio Grande do exist for the involved traffic, that the Commission had erred as a matter of law and upon the evidence in finding that through routes via the Rio Grande did not exist, and that this finding "prejudiced the entire proceeding" before the Commission. The court, again reversing the Commission, held that the evidence proved discrimination against the Rio Grande, and enjoined and annulled "the order" insofar as it denied and withheld relief from the Rio Grande, and "remanded" the case to the Commission for further proceedings in conformity with the court's opinion, but *only* insofar as the Commission "denied and withheld relief" to the Rio Grande.

These five states, representing territory served by long established Union Pacific routes from the Missouri River to the Pacific northwest, oppose Rio Grande proposals to short haul the shortest, swiftest and most economical route to eastern and southern markets, by requiring Union Pacific and over two hundred other railroads to enter into joint through rates with the Rio Grande whose admitted objective is to divert this traffic, primarily from the Union Pacific, in order to obtain a "bridge" haul and thereby improve its financial position. According to Rio Grande the "potential" volume of such traffic moving from the northwest to the east

and south, which would be "available for solicitation", amounts to 101,476 carloads annually.[2]

Being distant from the principal markets, the economic life of the northwest depends upon fast, efficient, low cost transportation. Present transportation facilities and routes to and from this area are more than sufficient and Union Pacific alone is shown to possess an unused transportation capacity of 85%. Piling on additional surplus facilities and unneeded routes, will, in the opinion of these states, adversely affect the economic future of this territory and violate the manifest policy and intention of Congress.[3]

The present through route provisions of the Act were adopted in 1940 in order to make the "shortest,

---

2 As indicated by the Commission, (287 I.C.C. 631) the bulk of the traffic sought constitutes agricultural and mineral products of the northwest, which (p. 623) now travel via Union Pacific "because the Union Pacific routes are shorter." The reverse movement west comprises only 56,286 carloads annually and was given little emphasis by Rio Grande. The only westbound articles included in the order were "granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations" in the northwest (p. 659).

The traffic east and the traffic west are entirely independent of each other and should have been so considered. The Commission's order which the Court annulled in *United States v. Mo. Pac. R. Co.*, 278 U.S. 269, 273, involved only the establishment of "through routes for west bound freight traffic."

3 Congressional policy since 1920 has stressed as paramount economy and efficiency in transportation facilities. *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U.S. 266, 277. The 1940 declaration of Congress (49 U.S.C. preceding § 1) emphasizes "adequate, economical and efficient service" and this declaration controls the "basic power of the Commission." *American Trucking Assns. v. U. S.*, 344 U.S. 298.

quickest, and cheapest routes available." Union Pacific routes meet these tests.

Ordinarily requests for new routes are justified as "needed" and involving "more efficient or more economic" transportation by showing that they are shorter than existing routes. The Rio Grande routes sought herein are unique in that they would short haul the short route by substituting an uneconomic, wasteful, slower route from 33 to 219 miles longer which must go up and down many of the highest mountains in the country.[4]

Long experience has demonstrated to these states that the fantastic wastefulness involved in Rio Grande proposals would ultimately be saddled upon the public

4 Report No. 404, Senate Bill 1261, 75th Cong., 1st Session, page 2. Congressional Record, pp. 6055-6056. 287 I.C.C. 655.

5 At page 648, the Commission reviews some of the proof showing the Rio Grande to be "less favorably situated," and at page 656 it finds that "operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein." The full impact of wastefulness established beyond dispute by the record is not reflected. This shows that the Rio Grande "has no value as a service route" (R. 1163, 1319); that curvature is so great a train completes a circle every 5.45 miles and requires 51% more effort (Ex. 12, p. 9), at a cost of $124.33 per car (Ex. 15, p. 7; Ex. 53, p. 3), and that freight car days are wasted.

In *Texas v. United States*, 292 U.S. 522, 530, the Court said it is a "primary aim" of present transportation policy of Congress "to secure the avoidance of waste." One of the long expressed purposes of Congress has been to eliminate this kind of "cut-throat" competion. *United States v. Louisiana*, 290 U.S. 70, 74.

In this connection it is significant that practically all shipper witnesses of Rio Grande, including the U.S. Department of Agriculture, supported their position on the ground that notwithstanding the mandate of Congress against short hauling existing routes, all gateways should be opened and unlimited cross-hauling should be the rule.

and shippers of these states." This local marginal mountainous railroad should not be permitted to force its admittance into the transcontinental railroad systems which this region must support.

The overwhelming public detriment that these states and their communities may suffer under Rio Grande proposals includes: (1) reduction in existing service, (2) abandonment of branch lines, (3) waste of present and adequate facilities, (4) increases in unit costs, and (5) destruction of long established channels of trade and commerce.[7]

The differences in rates which Rio Grande now experiences merely reflect differences in transportation conditions which have always characterized sound transportation regulation and practices.[8]

It is clear that what Rio Grande seeks in this proceeding, a rate advantage by circumventing the requirements of the Act, is not appropriate under the Act and is

---

6 As noted by the Court in *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U.S. 266, 270, "when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss."

7 This Court has said that it "could not be readily supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing." *Texas & Pac. Railway v. Interstate Com. Com.*, 162 U.S. 197, 211.

8 *Barringer & Co. v. U.S.*, 319 U.S. 1, 9. *Brown Lumber Co. v. L. & N. R. Co.*, 299 U.S. 393, 396.

The Act was "not intended to ignore the principle that one can sell at wholesale cheaper than at retail." *Interstate Com. Commiss. v. B. & O. Railroad*, 145 U.S. 263, 276.

inconsistent with previous decisions of the Commission in this field.[9]

## The Questions Are Substantial

1. The Commission's order establishes through routes and joint rates for Rio Grande on a specified list of commodities and gives Rio Grande for the first time a right to solicit and transport a substantial volume of traffic that it could not previously carry. Limitations on the scope of the order to the articles therein named reflects the proof as to the various public interest requirements under the Act including the showing as to dissimilarity of transportation conditions. (287 I. C. C. 619, 656.) The Rio Grande has no legal or other right to the traffic it seeks to divert to its line, *A., T. & S. F. Ry. v. United States*, 279 U. S. 768, 780. Under such circumstances Rio Grande has no legal standing to seek the assistance of the courts in order to broaden the order and obtain additional "pecuniary gain" that is dependent upon administrative findings of public interest.

The district court conceded that the Commission's order "took nothing away from the Rio Grande which it already had" and on that basis "caused no pecuniary loss to the Rio Grande". It held, however, that failure to give Rio Grande all of the "increase of traffic" and all of the increase of "net earnings" requested may constitute "pecuniary injury" to the Rio Grande.

---

9 *Adrian Grain Co. v. Ann Arbor R. Co.*, 276 I.C.C. 334, 333, summarizes recent Commission decisions and points out that through routes have been established when they "eliminated expensive out-of-line hauls," or were "shorter" or "were at least as economical;" and were rightly denied in the case being heard since the "routes sought are substantially longer than the present routes, and their establishment would appear to encourage wasteful and uneconomic transportation" and "would not 'give reasonable preference' to the originating carrier."

We are not aware that any court has previously suggested that a "pecuniary loss" may be shown by a failure to obtain the full amount of "pecuniary gain" requested. No authority whatever is cited by the court in support of this novel doctrine. The cases noted by the court, in this connection, all involve an actual or threatened "loss" of something previously possessed. The question in each case is whether the particular loss constitutes "legal injury".[10]

The district court, we submit, can find no support for its views because in such cases as *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479, involving establishment of a union station at Cleveland, this Court held at page 487 that "legal injury" was not shown even though the "financial stability" of a carrier was threatened. The point in such cases, which escaped the district court, is that no "legal injury" was shown notwithstanding such losses. In numerous cases this Court has declared that previously enjoyed rights must be "injuriously affected" in order to have standing to review Commission orders.[11]

---

10 In the *Chicago Junction Case*, 264 U.S. 258, the order substituted a "monopoly" for previous "neutral control" of terminal railroads in Chicago and subjected "plaintiffs to irreparable injury" in an amount which the opinion said at page 266 "exceeds $10,000,000," annually.

In *Edward Hines Trustees v. U.S.*, 263 U.S. 143, 147, it was contended by a shipper that railroad property was being taken by the Commission order "without due process of law, in violation of the Fifth Amendment" to the detriment of the shipper, but the Court held that this was not legal injury to the shipper.

In *Sprunt & Son v. United States*, 281 U.S. 249, the order deprived a shipper of a "competitive advantage" of $7.00 per ton previously enjoyed, but the Court held that this was not legal injury and dismissed the suit.

11 Many of the cases are summarized in *Moffat Tunnel League v. U.S.*, 289 U.S. 113, 119. See also *Claiborne-Annapolis Ferry v. U.S.*, 285 U.S. 382, *Alton R. Co. v. United States*, 315 U.S. 15, and compare *Atchison, T. & S. F. Ry. v. United States*, 130 F. Supp. 76.

In support of its decision as to legal standing the district court also suggested that "pecuniary injury" is not "essential to the right of judicial review". As sole support for this new rule of general application in the field of administrative law, the opinion cited two negro segregation cases. The gist of these cases as shown by the *Mitchell* decision is that judicial review may be had where the Commission order deprives a colored person of his constitutional right to "equality of treatment" by being forced to give up a pullman seat "under threat of arrest".[12]

There is no claim herein, even by Rio Grande, that any action of anyone has deprived it of any constitutional rights, and none could be made because, as noted, the Rio Grande has no legal, equitable or other right of any nature to the traffic it wants to divert to its line, *I., T. & S. F. Ry. v. United States*, 279 U. S. 768, 780. Hence, the cases relied on by the district court have no application. It is one thing to suggest that a deprivation of constitutional rights may not necessarily involve "pecuniary" loss; it is quite another thing to say that in cases involving no loss of constitutional or other legal rights, there may be a review without "pecuniary injury."

If either of the theories posed by the district court justifies legal standing, then a vast expansion of judicial review in this field is inevitable. Practically every disappointed applicant before an administrative tribunal

12 In *Mitchell v. United States*, 313 U.S. 80, the Commission had dismissed the complaint of a negro. The other case cited, *Henderson v. United States*, 339 U.S. 816, involved a "denial of dining service" by reason of color when there were "existing and unoccupied facilities."

would have a right to go to court if failure to obtain every "pecuniary gain" requested constitutes a "pecuniary loss" or if "pecuniary injury" is no longer a prerequisite to legal standing to maintain suit.

2. In holding that through routes were in existence the district court stated that its decision was upon a "narrow ground" and for such disposition of the case, "[t]his very brief and sketchy statement of the case will suffice". The Commission, on the other hand, based its contrary conclusion upon a full application of all of the tests declared by this Court to be decisive in *Thompson v. United States*, 343 U. S. 549. These tests include not merely a physical, objective inquiry but subjective matters such as a holding out, consent, custom and "course of business" by all carriers involved.[13] This requires a review of the entire record and history of operations and is not satisfied by a "brief and sketchy" review of the case. *Universal Camera Corp. v. Labor Bd.*, 340 U. S. 474, 488.

In weighing the evidence the Commission recognized, as noted above, that the objective of Rio Grande was to participate "as a bridge line" in the transportation of the products of the northwest region to eastern markets; and as to this traffic no "through shipments" had ever moved "to any destination east of Colorado

---

13 Applying the *Thompson* rule the Commission said at page 616:

"* * *It thus becomes necessary to determine whether the carriers in this proceeding 'hold themselves out as offering through transportation service' from and to the points here concerned via the Ogden gateway as indicated by their 'course of business' in respect of traffic over the routes in question."

The *Thompson* opinion at page 557 quotes a Commission Report to Congress that all of the tests therein enumerated "are not to be regarded as exclusive of others which may tend to establish a carrier's course of business with respect to through shipments."

common points", i. e., the eastern termini of the Rio Grande (287 I. C. C. 623, 617). The few shipments in the record in the reverse direction during 1948 were properly regarded by the Commission "as of an isolated nature" in view of the entire record (287 I. C. C. 618).[14]

The district court's statement that there has been a "continuous use of the Rio Grande route" is not supported by the record. Rio Grande's evidence of specific shipments related only to the year 1948. The President of Rio Grande testified that his railroad had no idea of participating in transcontinental traffic until after their modernization program was completed and this program was started only after the Dotsero cut-off was established in 1934. The "Moffat Tunnel Line" under which Rio Grande obtained a shorter line from Denver to Ogden was not acquired until 1947. (287 I. C. C. 622.) The Rio Grande's interest was in California traffic to the extent that it financed the construction of the Western Pacific in 1911 as an outlet to California. (287 I. C. C. 622.) The first indication that anyone in the northwest territory had concerning the desire of Rio Grande to open up through routes to this region was the unprecedented "pamphlet" campaign which the Rio Grande prosecuted among shippers to help it succeed in this litigation (R. 50). As shown by the Commission report at pages 636 and 638-639 reasons advanced for through routes included recent developments.[15]

---

14 The *Thompson* case, page 557, follows the rule declared by the Commission in *Beaman Elevator Co. v. Chicago & N. W. Ry. Co.*, 155 I.C.C. 513, that "isolated shipments" are insufficient to establish through routes.

15 The farm machinery business referred to by the Commission at page 636 "was established in 1947." Changes in the "use of grazing lands in national forests" mentioned at pages 638 and 639 were of recent origin.

Rio Grande supporters did not base their testimony on any claim of "continuous use". On the contrary they asserted that the routes were closed and the Ogden along with all other gateways should be opened without regard to the Congressional mandate against short-hauling existing routes.

Upon the basis of the entire record, and the "whole course of conduct of the Union Pacific" covering a period of "many years", the Commission correctly concluded at pages 618-619 that through routes were not in existence; and that any "other holding would constitute an open invitation to any shipper to set aside the provisions of section 15(3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15(4) made in 1940".

While the district court made the general conclusion that through routes were in existence, it did not define what routes of the many hundreds of thousands that might be created were included in that category. This Court made it clear in the *Thompson* decision, *supra*, at page 559, that the existence of through routes to points "short of Omaha cannot be used as evidence of the existence of a through route to Omaha". Through routes have definitely fixed and known termini, and, under the *Thompson* decision, proof of a shipment from Peoria, Ill., via the Rio Grande to Boise, Idaho, cannot be used as evidence of the existence of a through route via the Rio Grande from New York, Boston or Chicago, for example, to Portland, Oregon. Nor may one shipment from each of 18 eastern origin points via the Rio Grande to 10 destinations in the northwest suffice to prove that any through route exists via the Rio Grande for the traffic

concerned, to say nothing of the hundreds of thousands of through routes of which the Rio Grande claims its line to be a part between the 39,000 railroad stations in the east and south and the 2,900 stations in the northwest area.

The cancellation in 1906 and 1912 by Union Pacific of joint rates established by the receivership courts in 1897, in view of the history previously reviewed, fully accomplished a closing of the through routes in question. This was the admitted position of Rio Grande until after this Court handed down its decision in the *Thompson* case (June 2, 1952). In its publicity campaign prior to and after the filing of its complaint with the Commission, August 1, 1949, the Rio Grande publicly asserted that its purpose was to "restore" to the northwest the "rates and routes" established by the receivership courts in 1897. As a part of its publicity campaign, the Rio Grande printed and widely distributed a pamphlet entitled "20 Questions—An Informative Quiz", in which it posted 20 questions and answered them with the arguments it thought would convince shippers to aid it in its efforts. These questions clearly and indisputably show that the Rio Grande itself considered that the prior through routes via its line had been "closed" by the cancellation of the joint rates by the Union Pacific.[16]

---

16 Among the 20 questions were the following:

" 2 What Is Meant by the 'Closed' Gateway at Ogden?"

" 3 What Is the Effect of the Closed Gateway?"

" 4 How Does the Rio Grande Seek to Open the Ogden Gateway?"

" 5 How Will the Rio Grande Benefit from Opening of the Ogden Gateway?"

" 6 Why Does the Union Pacific Oppose Opening of the Ogden Gateway?"

(Continued on next page)

The suggestion of the district court that these routes were not closed disregards the realities of the situation and is in conflict with the understanding of the parties as shown by their conduct. There is no suggestion by the district court of what further action, if any, was required to close the route via the Rio Grande; and under the circumstances the Commission correctly refused to sustain Rio Grande's present position on the basis of a claim with reference to the sufficiency of a tariff change over forty years ago.

In filing this proceeding Rio Grande conceded in its complaint that the cancellation of tariffs by Union Pacific operated "to prevent the movement of freight traffic via the routes" sought and the action of Union Pacific and other defendants "deprives the public and the complainant of the use" of these routes. Ample authority and machinery existed to challenge the right of Union Pacific to close these routes under the tariff amendments made in 1906 and 1912. Neither Rio Grande nor any shipper took any action or made any such contention as is now advanced.[17]

---

(Continued from preceding page)

"7 Will the Open Ogden Gateway Reduce Freight Rates?"
"8 Will the Open Gateway Provide Improved Service?"
"9 With Opening of the Gateway, Will There be More Freight Cars Available for Northwest Shippers?"
"11 Will an Open Gateway at Ogden Benefit Colorado and Utah?"
"12. Will an Open Gateway at Ogden Benefit Shippers Outside of Union Pacific or Rio Grande Territory?"
"13 Will Opening of the Ogden Gateway Reduce Railroad Employment in the Closed Door Territory?"
"14 Will the Opening of the Ogden Gateway Reduce Taxes Paid in the Closed-Door Territory?"

17 In *Atlantic Coast Line R. Co. v. U.S.*, 284 U.S. 288, tariff amendments were cancelled which would have closed a through route. The Commission acted in that case under Section 15 (7) of the Act which permits the suspension of tariff changes and which authorizes such suspension upon complaint.

There is nothing new or novel in the closing of a through route by a tariff filing such as occurred here. The Commission in the present case adhered to the rule it has uniformly followed in this regard—a rule that recently was applied in *Steinmetz v. Atchison, T. & S. F. Ry. Co.*, 293 I. C. C. 202 (August, 1954), where it was held that complainant was "apprised" of the fact that a route was "closed" by the "publication of the joint through rate from and to these points for application over routes other than that used."[18]

The *Thompson* decision rejects the idea that publication of "local" rates as a part of a "combination" through rate constitutes the maintenance of a through route. Such a publication, the opinion holds at page 558, "proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines".

Legislative amendments to Section 15(3) of the Act in 1940 specifically recognize the "canceling" of "any through route or joint rate" by "any tariff or schedule" change. (49 U. S. C. A. 15(3).) The legislative history of this amendment shows that Congress and the Commission recognized for many years that the type of tariff filing made herein by Union Pacific operated to close a through route and that a standard for suspension of such closings should be a part of our statutory system.[19]

---

18 In *A., T. & S.F.Ry. v. United States*, 279 U.S. 768, 775, in upholding the "cancellation of the proposed tariff" which would have closed a through route, this Court said, "[i]ts proposed tariff was in effect a withdrawal."

19 The 1940 amendment consists of a new sentence added to Section 15(3). This sentence originated as a "clarifying" amendment to a Bill in 1937 with reference to the "elimination of any existing through route or joint rate." See Senate Report No. 404, 75th Cong. 1st Sess. (S. 1261); Senate Report No. 1970, 74th Cong. 2nd Sess. (S. 1636).

The decision in *Virginian Ry. v. United States*, 272 U. S. 658, provides no support for the district court's opinion. That case involved no question of establishing through routes since they already existed. The language in the opinion as to through routes is dictum. The case presented a clear case of discrimination by one railroad against 54 mine shippers on its own line who were refused the same rates enjoyed by 45 other mine shippers on the same line. It was not even necessary to establish joint rates in that case. Moreover, there was no problem of short-hauling.

This Court has said that the "Commission's determination of the point in time and space at which a carrier's transportation service begins or ends is an administrative finding which, if supported by evidence, is conclusive on the courts". *I. C. C. v. Hoboken R. Co.*, 320 U. S. 368, 378. Under this rule the Commission's determination herein that the Union Pacific effectively closed the routes in question is not subject to reversal.

The standard created by the district court herein for determining the existence of through routes assumes that the Union Pacific had the right and duty to refuse and stop shipments over the Rio Grande route in order to protect itself against short-hauling. Any such rule would place an impossible burden on a carrier and deny shippers a fundamental right which the Commission has always recognized of routing their own traffic.[20] Ad-

[20] At page 652 of the report the Commission recognizes and gives effect to the "right" of shippers to "route their own traffic." At page 618 the report points out that the few westbound movements through the gateway were "specified by the shippers" and the only use made of this route arose "by force of shippers or connecting carriers' routing." This occurred, the Commission found, despite the consistent "policy" of the Union Pacific "to guard jealously its long haul." Any other view, the report says at page 619, would completely circumvent the Act.

hering to this position in the recent case of *Steinmetz v. Atchison, T. & S. F. Ry. Co.*, 293 I. C. C. 202, it was held that although the route chosen by a shipper was "closed" by reason of a tariff publication, this "does not mean that a shipper may not specify routing for a shipment over such a 'closed' route and expect compliance with the routing thus specified." The rate for such shipment, the opinion states, would be the "combination rate".

There is nothing in the statutes or in prior decisions of this Court that would require a carrier to erect barriers at gateways in order to avoid the peril of being short hauled.[21]

It is a distortion of Section 15(8) to suggest that under this provision shippers have a right to route traffic only where a through route already exists within the meaning of Section 15(3) and (4). This statute gives a shipper a right always to choose between "two or more through routes". The statute has application only where "two" through routes exist. The rights of shippers where "two" through routes have not been established are not declared or covered by this section. The provision was added in 1910 (36 Stat. 553) as a part of the expansion of Section 15 with reference to the creation of new through routes and it was no doubt intended to protect shippers in the case of duplication of routes resulting from such legislation.

There is no occasion at this late date to conclude that Section 15(8) has been improperly interpreted by the Commission for nearly a half-century.[22]

---

21 The "duty of a railway company to receive freight when tendered for transportation" is noted in *Southern Ry. Co. v. Reid*, 222 U.S. 424, 435.

22 Our contention as to the interpretation of this section finds some support in *Lamb v. Moor*, 17 Ga. App. 542, 87 S.E. 837.

The suggestion of the District Court that issuance of "through bills of lading" on the few westbound movements described constituted a recognition of "through route status" contains the fundamental fallacy that the Union Pacific had the right and duty to refuse such lading. All that an employee of Union Pacific did or could do in this connection was to comply with the mandate in Section 20(11) that, when "receiving property for transportation" the railroad "shall" issue a bill of lading therefor.[23]

3. Since, as shown earlier, the limitations on the through routes and joint rates granted the Rio Grande arose from administrative findings concerning public interest and these limitations did not depend upon the Commission's position as to existence of through routes via the Rio Grande, the district court was not justified in declaring that the position of the Commission as to such routes "obviously prejudiced the entire proceeding". Moreover, and in any event the court was not justified, upon the basis of such a finding, in setting aside *only* that portion of the order which "denied relief to the Rio Grande". Anything which is held to prejudice an "entire proceeding" would necessarily vitiate the "entire proceeding", not merely a part thereof.

There is, moreover, in this case no showing that the Rio Grande is "suffering prejudice"[24] because of the

---

23 The "duty" to issue a bill of lading is imposed by Congress. *Atchison & Topeka Ry. v. Harold*, 241 U.S. 371, 378.

It was always true that even if a railroad had "no through route" it "was bound to accept goods destined beyond its line for delivery to the next carrier and was required by the statute to give a through bill of lading." *Norfolk & W. Ry. Co. v. Dixie Tobacco Co.*, 228 U.S. 593, 595.

24 *Chicago Board of Trade v. Olsen*, 262 U.S. 1, 43. *See Electric Bond Co. v. Comm'n*, 303 U.S. 419, 443.

Commission's finding that through routes were not already in existence. As noted above, it ordered through routes and joint rates for all commodities found necessary in the public interest, and limitations thereon were imposed by reason of public interest requirements of the Act.

Having made the findings required under Section 15(3) and (4), the Commission was free to feel the scope of its order. *United States v. Merchants &c. Ass'n*, 242 U. S. 178, 186-187. The concurring opinion of Commissioner Arpaia shows clearly that although he thought the desired routes were already "open and available to shippers", in deciding "to what extent" joint rates should be compelled, he concluded that they "are warranted in the public interest only on the commodities for which relief is included in the majority report". (287 I. C. C. 665.) Commissioner Patterson thought lumber and articles taking lumber rates should have been included in the order (287 I. C. C. 664).

4. The district court usurped administrative jurisdiction in declaring that the "facts alleged and the proof before the Commission" established "discrimination adversely affecting the Rio Grande and shippers over its lines", upon the basis of "existing rates and charges". Such a finding was made although the court frankly stated earlier that it was making only a "brief and sketchy" review of the case "since we rest our decision upon a narrow ground". That "narrow ground" related to the existence of through routes. It did not comprehend a review of the evidence or of the complete report of the numerous and complicated legal questions pertaining to rates and discrimination under the various sections of the Act.

In remanding the case the district court annuls and remands only that portion of the case which "denied relief" to the Rio Grande and orders the Commission to take "further proceedings in conformity with this opinion". Included in the opinion the court sets forth what it terms "instructions". Hence, if it heeds the remand, the Commission is prevented from reversing or reconsidering that part of the "prejudiced" proceeding which is favorable to the Rio Grande.

The opinion points to no evidence justifying its conclusion that "discrimination" is established. The Commission, after careful review of the evidence, holds that discrimination under Section 3 (4) is not shown (287 I. C. C. 658) and concludes that the Rio Grande as a "railroad, could not raise, in its own behalf, an issue under section 3(1)" (287 I. C. C. 619).

It is fundamental that the "court must act within the bounds of the statute" permitting judicial review.[25] Heretofore the rule has been that the "function of the reviewing court ends when an error of law is laid bare" and findings such as the above "usurped an administrative function."[26]

---

25 *Ford Motor Co. v. Labor Board*, 305 U.S. 364, 373. The applicable statute (28 U.S. Code, Sec. 1336) contains no authority to direct the Commission how to dispose of the case. And see *F.C.C. v. Allentown Broadcasting Corp.*, 75 S.Ct. 855.

26 *F.P.C. v. Idaho Power Co.*, 344 U.S. 17, 20.

Such findings constitute a "substitution of judicial for administrative discretion." *Communications Comm'n v. Woko*, 329 U.S. 223, 299. See also *Interstate Comm. Comm. v. Ill. Cent. R.R.*, 215 U.S. 452, 470; *Federal Comm'n v. Broadcasting Co.*, 309 U.S. 134, 144.

Rate orders are "clearly legislative." The *Chicago Junction Case*, 264 U.S. 258, 263.

It is not within the province of the court "to revise the Commission's decision and to enter such judgment as the court may think just." *Radio Comm'n v. Nelson Bros. Co.*, 289 U.S. 266, 276.

Unless the district court's opinion is reversed, Rio Grande will be free to go back to the Commission and insist that it enter an order carrying out all the "instructions", observations and declarations in such opinion without reference to or consideration of any independent powers of the Commission. In short, to order joint rates in connection with the Rio Grande on *all* of the traffic. In this regard, as well as upon other phases of this case, as previously noted, the district court has plainly usurped the Commission's discretion and greatly enlarged the nature and scope of judicial review by the present opinion.

**Conclusion**

These five states can suggest no language which describes the consequences of the district court decision herein better than the words of our late Chief Justice Vinson, when, speaking for this Court, he said that "diversion" of "traffic to the lines of a financially weak carrier" will "cause important changes in the movement of traffic, diverting traffic to a new geographic area *at the expense of* other carriers and *other areas*"; and that Section 15(4) of the Act was amended by Congress to prohibit this sort of "tinkering" with through routes.[27]

After extensive deliberation and careful consideration of the entire record, the Interstate Commerce Commission, which as often noted by this Court,[28] is not unfriendly to "completely" eliminating the "short hauling restriction on its power to establish through routes", frankly declared that the conclusion now reached by the district court as to the existence of through routes, would "set aside the provisions of section 15(3) and (4) of the

27 *U.S. v. Great Northern R. Co.*, 343 U.S. 562, 574-575.

28 *Thompson v. United States*, 343 U.S. 549, 555-556.

act"; and the Commission added that this would be a "result plainly not intended by the Congress" and "a result clearly not in accord with the decision in *Thompson v. United States, supra.*"[29]

As representatives of the shippers and public of the states directly affected we are interested in the preservation of the "right guaranteed by Section 15(4)"[30] because that is our only guarantee that the good service of the shortest, most efficient and most economical transcontinental transportation facilities will continue to be available to us at the lowest possible cost.

We therefore submit that the questions presented by this appeal are substantial and of general public importance and vitally affect the economic condition of a large area of this country.

Respectfully submitted,

BERT L. OVERCASH,
*Counsel of Record for Appellants,*
State Capitol Building,
Lincoln, Nebraska.

DON EASTVOLD,
ROBERT L. SIMPSON,
C. W. FERGUSON,
JAMES B. PATTEN,
GEORGE F. GUY,
CLARENCE S. BECK,
*Of Counsel.*

August, 1955.

---

29 287 I.C.C. 611, 619.

30 *Thompson v. United States*, supra, p. 559.

## PROOF OF SERVICE

I, BERT L. OVERCASH, counsel of record for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 19th day of August, 1955, I served, on behalf of all appellants herein, copies of the foregoing Jurisdictional Statement on the several parties thereto, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Stanley N. Barnes, Esq.
Assistant Attorney General
Department of Justice
Washington 25, D. C.

Donald E. Kelley, Esq.
United States Attorney
Post Office Building
Denver 1, Colorado

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Samuel R. Howell, Esq.
Assistant General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed en-

velope with air mail postage prepaid to:

Robert E. Quirk, Esq.
1116 Investment Building
Washington 5, D. C.

Dennis McCarthy, Esq.
Walker Bank Building
Salt Lake City 1, Utah

Ernest Porter, Esq.
603 Rio Grande Building
Denver 2, Colorado

4. On The Public Utilities Commission of Colorado by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

William T. Secor, Esq.
Asst. Attorney General
State of Colorado
Denver, Colorado

5. On Brotherhood Committees of employees of The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Alden T. Hill, Esq.
Woolworth Building
Fort Collins, Colorado

6. On Pueblo Chamber of Commerce; Arkansas Valley Stock Feeders Association; Colorado Wool Growers Association; Western Forest Industries Association; Koppers Company, Inc.; Idaho Farm Bureau; Public Service Commission of Utah; Utah Growers Cooperative, Inc.; Knudsen Builders Supply Company, Inc., and Structural Steel and Forging Company, by mailing a

copy in a duly addressed envelope with air mail postage prepaid to:

Barry & Hupp
738 Majestic Building
Denver 2, Colorado

7. On Holly Sugar Corporation by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Lowe P. Siddons, Esq.
Dennis O'Rourke, Esq.
Attorneys for Holly Sugar Corporation
Holly Sugar Building
Colorado Springs, Colorado

8. On The American Short Line Railroad Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

W. J. Hickey, Esq.
Vice President and General Counsel
The American Short Line Railroad Association
2000 Massachusetts Avenue, N. W.
Washington 6, D. C.

BERT L. OVERCASH
*Counsel of Record for*
*Appellants Herein.*

## APPENDIX A

*Order*

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of January, A. D. 1953.

No. 30297

Denver & Rio Grande Western Railroad Company

v.

Union Pacific Railroad Company, et al.

This proceeding being at issue upon complaint and answers on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and the Commission having found in said report (1) that through routes and joint rates on particular commodities from and to specified areas via Ogden or Salt Lake City, Utah, in connection with the complainant herein, are necessary and desirable in the public interest; (2) that the assailed rates on the same commodities and from and to the same points are and will be unreasonable and unduly prejudicial and preferential; and (3) that the maintenance by the defendants of joint rates between points in the northwest area, as described in the report, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to unlawful discrimination;

*It is ordered*, That the defendants named in the complaint, according as they participate in the transportation, be and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph.

*It is further ordered*, That said defendants, and the complainant, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediateely north of points on the lines of

the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

*It is further ordered*, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

*And it is further ordered*, That this order shall continue in force until the further order of the Commission.

By the Commission.

GEORGE W. LAIRD,
Acting Secretary.

(Seal)

## APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO

---

Civil Action No. 4492

The Denver and Rio Grande Western Railroad Company,
Plaintiff,

v.

United States of America and Interstate Commerce Commission,
Defendants,

Union Pacific Railroad Company, et al.,
Intervening Defendants.

---

Filed Feb. 14, 1955

*Final Judgment and Decree*

---

The hearing in the above-entitled cause having been held on June 8 and 9, 1953, before Circuit Judge Orie L. Phillips and District Judges Royce H. Savage and William Lee Knous, constituting a District Court of three judges, convened pursuant to Title 28, U. S. C., Sections 2284 and 2325, and all parties being represented by counsel, and the Court having received the evidence offered and heard the arguments of counsel, and the Court being fully advised in the premises and having filed its opinion herein on January 13, 1955, and the Court being of the opinion that the order of the Interstate Commerce Commission dated January 12, 1953, in its Docket No. 30297 is invalid and unlawful insofar as it denied relief to the plaintiff above named;

NOW, THEREFORE, upon the basis of said opinion of this Court dated January 13, 1955, and for the reasons therein set forth, IT IS ORDERED, ADJUDGED AND DECREED that the injunction and other relief prayed for by plaintiff and intervening plaintiffs in the complaint be and the same is hereby granted, and the order of the Interstate Commerce Commission dated January 12, 1953, be and the same is hereby annulled and set aside insofar as it denied and withheld relief to the plaintiff and intervening plaintiffs,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this cause, insofar as the aforesaid order of the Interstate Commerce Commission denied and withheld relief to plaintiff and intervening plaintiffs, be and the same is hereby remanded to the Interstate Commerce Commission for further proceedings in conformity with the opinion and judgment of this Court.

DATED this 1st day of February, 1955.

/s/ ORIE L. PHILLIPS
Orie L. Phillips, Chief Judge
United States Court of Appeals

/s/ ROYCE H. SAVAGE
Royce H. Savage, Judge
United States District Court

/s/ WILLIAM LEE KNOUS
William Lee Knous, Judge
United States District Court

## APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO

---

Civil Action No. 4492

The Denver and Rio Grande Western Railroad Company,
Plaintiff,

vs.

United States of America and Interstate Commerce Commission,
Defendants.

Filed Apr 22 1955

---

*Order Denying Motion for New Trial or Reargument and Reconsideration*

---

Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company; and Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission, intervening defendants herein, having seasonably filed their motion for new trial or reargument and reconsideration and this Court having entertained and duly considered said motion and brief of plaintiff in opposition thereto,

IT IS ORDERED:

1. That said motion be and it is hereby overruled and denied;

2. That the Clerk of this Court transmit forthwith copies of this Order to counsel in this case.

DATED at Denver, Colorado, this 22 day of April, 1955.

By the Court:

/s/ ORIE L. PHILLIPS
Orie L. Phillips, Chief Judge
United States Court of Appeals
for the Tenth Circuit

/s/ ROYCE H. SAVAGE
Royce H. Savage,
United States District Judge for the
Northern District of Oklahoma

/s/ WILLIAM LEE KNOUS
William Lee Knous;
United States District Judge.

## APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

No. 4492 Civil

The Denver and Rio Grande Western Railroad Company,
Plaintiff,

v.

United States of America and Interstate Commerce Commission,
Defendants.

Messrs. Dennis McCarthy and Robert E. Quirk (Herbert M. Boyle was with them on the brief) for plaintiff.

Mr. E. Riggs McConnell (Messrs. Stanley N. Barnes, James E. Kilday, and Donald E. Kelley, were with him on the brief) for the United States of America, defendant.

Mr. Samuel R. Howell (Mr. Edward M. Reidy was with him on the brief) for the Interstate Commerce Commission, defendant.

Messrs. Elmer B. Collins, F. O. Steadry, L. E. Torinus, Jr., and Eugene S. Davis (Messrs. F. J. Melia, Warren H. Ploeger, Roland J. Lehman, Carson L. Taylor, E. G. Knowles, W. R. Rouse, Nye F. Morehouse, M. L. Countryman, Jr., Edwin C. Matthias, J. C. Gibson, and Joseph H. Miller were with them on the briefs) for intervening railroad defendants.

Messrs. W. J. Hickey, John R. Barry, and Lee J. Quasey (Messrs. Duke W. Dunbar, Frank W. Wachob, William T. Secor, E. R. Callister, Jr., Peter M. Lowe, Paul M. Hupp, Lewe P. Siddons, Dennis O'Rourke, and Alden T. Hill were with them on the briefs) for intervening plaintiffs.

Messrs. William E. Doyle, Robert L. Simpson, Howard B. Black and Bert L. Overcash (Messrs. Don Farsvold, C. W. Ferguson, James B. Patten, Clarence S. Beck, and Richard H. Shaw were with them on the briefs) for intervening defendants.

---

Before PHILLIPS, Chief Circuit Judge, and KNOUS, Chief District Judge, and SAVAGE, District Judge.

Per Curiam.

This action was brought by the Denver and Rio Grande Western Railroad Company against the United States of America and the Interstate Commerce Commission under the Urgent Deficiencies Act to set aside and permanently enjoin, in part, an order of the Interstate Commerce Commission.

In August, 1949, the Rio Grande filed a complaint with the Interstate Commerce Commission against the Union Pacific and more than 200 other railroad defendants. In such complaint the Rio Grande alleged that the defendants have failed and refused to establish and maintain competitive joint rates on freight traffic with the Rio Grande: (a) via its Colorado and Utah gateways between places on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof; and (b) between Utah common points and places on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia;

And that through routes now exist and have for many years existed for the interchange of traffic by the Rio

Grande with the Union Pacific at Provo, Ogden and Salt Lake City, Utah, and with the Union Pacific and certain other defendants at Denver, Colorado Springs, Pueblo, Walsenburg and Trinidad, Colorado, as to freight traffic

(a) between points on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof; and

(b) as to freight traffic between Utah common points and points on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia;

And that the rates and charges applicable to such traffic between the points described via such through routes, with minor exceptions, are based upon the combination of the intermediate local or other rates, which rates and charges, in the aggregate, are substantially higher than the joint rates maintained by the defendants on similar competitive traffic between the same origin and destination places and territories which moves via the Union Pacific or via the Union Pacific and the other defendants, and that such combination rates are unjust, unreasonable and discriminatory, as compared with the competitive joint rates maintained by the Union Pacific or via the Union Pacific and the other defendants on like freight traffic via other competitive routes;

And that the failure and refusal of the Union Pacific and other railroad defendants to establish joint competitive through rates and charges applicable to the freight traffic between the points above described re-

sults in combination through rates which are excessive, unjust, unreasonable and constitute violations of §§1, 3 and 15 of the Interstate Commerce Act[1] and was and is contrary to the national transportation policy, since it deprives the public, shippers and the Rio Grande of the use of reasonable and available through routes and rail facilities at just, reasonable and non-discriminatory through joint rates, which were and are necessary and desirable in the public interest.

The Rio Grande prayed that the Commission enter an order requiring the Union Pacific Railroad and the other defendant railroads to establish and maintain for the future, just, reasonable, and non-discriminatory competitive joint rates on the freight traffic via the route of the Rio Grande through its Colorado and Utah gateways between (a) points on the Union Pacific and its connections in Utah, north of Ogden, Utah; and in Idaho, Montana, Oregon, Washington, and British Columbia, and (b) Colorado common points, such as Denver, Colorado Springs, Pueblo, Walsenburg, and Trinidad, Colorado, and points east thereof; and between (c) the points designated in (a); and (d) Utah common points.

By the challenged order entered on January 12, 1953, the Commission granted some but not all of the relief sought by the Rio Grande. 287 I. C. C. 611. In this action the Rio Grande seeks to have the court enjoin, set aside, annul and remand, with appropriate directions, that part of the order which denied relief sought by the Rio Grande. Union Pacific and other railroads and other persons have intervened with permission of the Court.

1 Hereinafter called the Act.

Section 1, Par. (4) of the Interstate Commerce Act in part provides:

"It shall be the duty of every common carrier * * * to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; * * *. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3, Par. (4) of such Act in part provides:

"All carriers * * * shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper * * *."

Section 13(1) of such Act in part provides:

"That * * * any common carrier, complaining of *anything done or omitted to be done* by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to

satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper." (Italics ours.)

Section 15(1) of such Act provides:

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall

cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

At the threshhold we are confronted with a motion of the defendants to dismiss on the ground that the Rio Grande is without standing to maintain this suit. We hold that the Rio Grande has such standing. Since we so hold, by reason of our conclusion with respect to the existence of the through routes, the erroneous finding of the Commission on that issue, the erroneous application to the facts by the Commission of certain provisions of the Act, and the rights of the Rio Grande under the provisions of the Act, we shall state in detail our reasons for denying such motion, after a full consideration of the merits.

## I.

## The Merits

The Rio Grande operates approximately 2400 miles of railroad in Colorado, New Mexico and Utah. From its northern terminus at Ogden, Utah, it runs south to Salt Lake City and Provo, Utah, thence generally east to Dotsero, Colorado, where it divides, one branch going east to Denver, the other southeast to Pueblo. From Denver the line runs south through Colorado Springs to Pueblo and Trinidad. Other lines serving territories in southern Utah, northwest New Mexico and southern Colorado are not of importance in this action.

The Rio Grande has interchange track connections and interchanges traffic with the Union Pacific at Denver,

Colorado, and at Ogden, Salt Lake City and Provo, Utah; with the Southern Pacific at Ogden, and the Western Pacific at Salt Lake City. It has interchange track connections and interchanges traffic at Denver with the Rock Island, the Burlington, Santa Fe and the Colorado & Southern; at Colorado Springs with the Santa Fe and the Rock Island; at Pueblo with the Santa Fe, the Colorado & Southern and the Missouri Pacific; at Walsenburg with the Colorado & Southern and at Trinidad with the Santa Fe and the Colorado & Southern.

The Union Pacific, with its leased lines, operates as a single system. From Ogden, Utah, one line of the Union Pacific extends in a southwesterly direction through Salt Lake City and Provo and thence to Los Angeles. Another line extends northwest through Utah, Idaho, Oregon, Washington and Montana, serving what is referred to as the northwest territory, or the closed door territory. From Ogden, the Union Pacific runs generally easterly through Cheyenne and Denver, with eastern termini on the Missouri River at Omaha and Kansas City. At various points on its line it connects and interchanges traffic with the other intervening railroads.

The Union Pacific and other intervening railroads and the Rio Grande participate in through routes and joint rates with each other and with other carriers on transcontinental and other traffic, with certain exceptions. Joint rates generally do not apply in connection with the Rio Grande on traffic originating at or destined to points in Utah, north of Ogden, and in Idaho, Montana, Oregon and part of Washington. Joint rates apply on such traffic over the Union Pacific through Wyoming, but if routed over the Rio Grande to and from Ogden,

the higher combination rate, consisting of the aggregate of local rates, applies.

The transcontinental traffic to and from this northwest territory ordinarily moves over the Union Pacific from or to Colorado or Missouri River gateways, rather *[than over the Rio Grande route. This is due in part, to the refusal of Union Pacific to join with Rio Grande in establishing joint rates with respect to such traffic. The higher rates effectually close the Ogden gateway commercially and enable the Union Pacific to obtain the long haul on such traffic.

The power of the Commission to establish through routes and joint rates is limited by §15(4) of the Act, which declares that, except as provided in §3 of the Act, a railroad may not be required without its consent to embrace in such route substantially less than the entire length of its railroad which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long, as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed is needed in order to provide "adequate, and more efficient or [more economic], transportation." It is further provided that in prescribing through routes the Commission shall, so far as is consistent with the public interest and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier which originates the traffic. The section further provides that no through routes and joint rates applicable thereto shall be established for the purpose of assisting any carrier to meet its financial needs. This section was designed

*APPELLANTS' NOTE: The language included in brackets is modified by substituted page 2 of Appendix E.

to restrict the power of the Commission to establish through routes which would short haul a carrier without its consent.

Rio Grande contended at the hearing before the Commission, and contends here, that the routes over which joint rates are sought were in existence and open to traffic at combination rates, and that the Commission was not called upon to establish through routes and, therefore, limitations on its power to do so, imposed by §15(4), are not applicable and need not be considered. It urged that the principal task of the Commission was to determine whether the through rates resulting from the combination or aggregate of intermediate rates over such existing through routes are unjust, unreasonable or discriminatory, in violation of §§1 and 3 of the Act, and contrary to the national transportation policy.

The Commission recognized that the first question for its determination "is whether or not the present routes by way of the Ogden gateway constitute 'through routes' as that term is used in section 15(3) and (4) of the Act." Only five of the ten participating members of the Commission joined in the report and order of the Commission, wherein it was first determined that through routes were not in existence over the Rio Grande in connection with the Union Pacific through the Ogden gateway. Having reached this conclusion, the Commission proceeded upon the assumption that any order requiring the establishment of such through routes and joint rates over them must be grounded on findings, as specified in §15(3) and (4). Thus limited in its further consideration of the case, the Commission entered its order:

> "That it is necessary and desirable in the public interest, in order to provide adequate and more eco-

nomic transportation, that through routes and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kansas, to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas."

In all other material respects the relief requested by the Rio Grande was denied.

This very brief and sketchy statement of the case will suffice, since we rest our decision upon a narrow ground. We are of the opinion that the finding of the Commission that there are at present no through routes over the Rio Grande via the Ogden gateway is not supported by substantial evidence. It is our view that the Commission erred as a matter of law in reaching the conclusion, upon a consideration of undisputed facts, that such through routes are not in existence. This erroneous, self-imposed restriction upon its authority to establish joint rates obviously prejudiced the entire proceeding.

The undisputed evidence bearing upon the crucial question of existing through routes must be summarized. In 1897, the Union Pacific established joint through competitive rates with the Rio Grande to and from points in the northwest area through Ogden. These rates were in effect until canceled by Union Pacific in 1906 from and to some points and in 1912 from and to remaining points. But the through routes were not closed.

Counsel for Union Pacific expressed the opinion at the hearing before the Commission, in response to interrogation by Chairman Alldredge, that the cancellation of the joint rates did not close the through routes and that shippers were free to route via the Rio Grande if they wanted to pay more.

The principal traffic witness of the Union Pacific testified at the hearing that a shipper who was willing to pay the higher combination rate had the right to specify under §15(8) of the Act a route via the Rio Grande. It should be observed that this right exists only when through routes and through rates have been established. This witness further testified that some joint through rates are now published in a Union Pacific tariff for application to shipments of sheep and goats from the northwest area via Ogden and the Rio Grande to points on the Missouri River and east thereof.

A continuous use of the Rio Grande route in the movement of traffic to and from the closed door area at through combination rates, without objection of the Union Pacific or participating railroads, is shown by the evidence, although the volume of traffic involved is comparatively small. In 1948, which was selected as a

representative year, 37 carload shipments were made on through bills of lading from the northwest area to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific or its connections, but none moved to any destination east of Colorado common points. In the same year, 18 carload shipments were made west bound on through bills of lading from points east and southwest over connecting lines and the Rio Grande to Salt Lake City or Ogden and the Union Pacific to destinations in the northwest area. In addition, 21 carload shipments moved on through bills of lading from various eastern points to destinations in the northwest area, which were routed over the Rio Grande and Union Pacific, were held by Rio Grande at Denver or Pueblo for change of the routing because the joint through rates were not applicable. The traffic movement to and from the northwest area over the Rio Grande through the Ogden gateway on through bills of lading and at through rates was substantially the same in years prior to 1948 and continued into 1949, until the date of the Commission hearings.

From November, 1942, to August, 1945, a number of shipments were diverted under service orders issued by the Commission from the regularly used routes to the Rio Grande route. During World War II mixed trains of troops in passenger cars and of military supplies in freight cars moved from eastern and southern points on through billing over the Rio Grande via Ogden and Union Pacific to the closed door area. These trains were not routed under service orders issued by the Commission. In 1949, when the main line of the Union Pacific in Wyoming was blocked by snow, the traffic was diverted

over the Rio Grande between Denver and junctions with the Union Pacific in Utah. These latter movements were made under emergency conditions and admittedly do not tend to establish an ordinary course of business between the carriers involved, but the Commission did not invoke its authority under § 15(4) of the Act to establish temporary through routes which indicates that the Commission assumed that through routes were already in existence.

It is well settled that a joint rate is not essential to the existence of a through route. The rate which applies over a through route may be the aggregate of separate rates fixed independently by the several carriers participating in the through route. *St. Louis-Southwestern R. Co. v. United States,* 245 U. S. 136, 139; *Thompson v. United States,* 343 U. S. 549, 556. In *Thompson v. United States, supra,* the court defines a through route as follows:

> "* * * The statutory term 'through route,' used throughout the Interstate Commerce Act, has been defined by this Court as follows:
>
> "'A "through route" is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a "through rate." This "through rate" is not necessarily a "joint rate." It may be merely an aggregation of separate rates fixed independently by the several carriers forming the "through route": as where the "through rate" is "the sum of the locals" on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. Through Routes and Through Rates, 12 I. C. C. 163; 166.'

"In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service."

While the foregoing definition of "through route" compels us to conclude that the through routes contended for by Rio Grande were in existence, the Commission relied on the *Thompson* case in reaching its decision that through routes were not in existence. But the facts in the *Thompson* case are in striking contract with the facts in this case. There, the question was whether a route from Lenora, Kansas, via Missouri-Pacific to Concordia, Kansas, and thence via Burlington to Omaha was a through route. No evidence was presented that any shipment had ever been made from Lenora to Omaha via the Burlington or that the carriers had ever offered through service over that route.

In our case, through routes and joint rates were established in 1897 and the joint rates remained in effect for some fifteen years. While the joint rates were canceled by Union Pacific, nothing was ever done to close the routes and diminished traffic continued to move over the same through routes at the higher through combination rates. Moreover, joint rates were continued in effect as well as through routes in respect to the shipment of sheep and goats from the closed door area through Ogden over the Rio Grande to the Missouri River and beyond. The Union Pacific and other participating railroads have issued through bills of lading, thereby recognizing the through route status. Shipments were diverted from the Union Pacific over the Rio Grande under emergency con-

ditions without having the Commission authorize temporary through routes, which suggest that both the Union Pacific and the Commission assumed the existence of through routes.

The Commission stated in its report and order that "The Ogden gateway routes are not considered as open or through routes commercially, but as routes that are closed to shippers because of the higher rates applicable." Then follows a statement that the establishment of joint competitive rates would result in such routes becoming "effective through routes, a character which they do not now possess." Thus, it appears that the Commission reasoned that the closing of the routes in a commercial sense by applying the higher combination rates terminated the through routes. But, it was held to the contrary in *Virginian Railway Co. v. United States*, 272 U. S. 658. There, of 99 coal mines located on the line of the Virginian, 45 enjoyed through routes and joint rates to the West because of certain trackage arrangements entered into between the Virginian and the Chesapeake & Ohio. As to other complaining mines, the court said, at page 661:

> "* * * But that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these 54 mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive. * * *"

In discussing the attack made on the order of the Commission fixing joint non-discriminatory rates, the court stated, at page 666:

> "* * * The Virginian contends that the order is void because the Commission directed the establish-

ment of through routes and joint rates without finding that they are necessary in the public interest. Such a finding is essential to the validity of an order under § 15(3). But the order here in question was not sought or made under § 15(3) and does not direct the establishment of through routes and joint rates. Through routes to the West were already in existence. And there were through rates by combination. (Citing cases.) The fact that the combination rates were excessive constituted the only obstacle to the movement."

The intervening railroads argue that Rio Grande had the burden of proving, in order to show the existence of the through routes contended for, an actual movement of traffic between every point in the northwest area and every point in the United States on every railroad east of a north and south line drawn roughly along the eastern boundary of Colorado. They point out that there are some 2,900 railroad stations in the northwest area and some 30,000 stations in the area east of Colorado and that there are undoubtedly hundreds of thousands of through routes available in the published tariffs between the thousands of stations in the involved area of which Rio Grande claims to be a part. This question was not considered by the Commission, and we do not reach it here. In our view, the uncontradicted evidence clearly established the existence of through routes to and from points on the Union Pacific in the northwest area and the Rio Grande via the Ogden gateway to and from Colorado common points, the Missouri River gateways and beyond. Since the case must be remanded to the Commission for a new hearing, we believe that the Commission should initially pass on the question of whether the burden is on the Rio Grande to show some actual movement of traffic on through billing over each of the possible routes

between the thousands of stations in the involved areas. It might be mentioned in passing that the court in the *Virginian Railway Company* case concluded that "through routes to the west are already in existence," without apparent direct proof of transportation of freight from all points on the Virginian to all points in the west via the Chesapeake & Ohio.

The contention of the intervening railroads that we are not authorized to enter an order remanding the case to the Commission with appropriate instructions is refuted by the recent order entered by the Supreme Court in *Secretary of Agriculture v. United States,* 347 U. S. 645.

## II.

## The Motion to Dismiss

*[We have concluded that under the evidence before the Commission the existence of through routes via the Rio Grande was clearly established, as a matter of law, and that the Commission erred, as a matter of law, in not finding the existence of such through routes.

We have further concluded that the Commission, in determining whether the Union Pacific Railroad and the other defendant railroads should be required to establish and maintain for the future just, reasonable, and nondiscriminatory competitive joint rates, as prayed for by the Rio Grande, erred as a matter of law in failing to apply the provisions of § 1(4) and § 3(4), rather than the provisions of § 15(3).

The duties and powers of the Commission, with respect to the relief sought by the Rio Grande, are clearly provided in § 1(4) and § 3(4) of the Act. The right of

*APPELLANTS' NOTE: The language included in brackets is modified by substituted page 3 of Appendix E.

the Rio Grande to file its complaint with the Commission and seek the relief therein prayed for is clearly given by § 13 of the Act. Under the Act, a carrier is as fully entitled to non-discriminatory treatment as a shipper. See *Chicago Junction* case, 264 U. S. 258, 267, which cites with approval *Pennsylvania Co. v. United States*, 236 U. S. 351, where the complainant sought relief under § 3 of the Act.

The fact that the portion of the order here assailed was negative in character no longer affords a ground for the denial of judicial relief. See *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 135-143; *Mitchell v. United States*, 313 U. S. 80, 92, 93.

The negative portion of the order required no affirmative action by the Rio Grande and took nothing away from the Rio Grande which it already had, and, if considered solely from those points of view, the order caused no pecuniary loss to the Rio Grande.

If the Rio Grande, in the proceeding before the Commission, established its right to the relief prayed for, it was entitled to an order establishing just and reasonable and non-discriminatory through rates and [equitable divisions thereof, and a removal of the discrimination resulting from the existing through rates, which were a combination of intermediate or local rates, and the denial of such relief was the denial of a right given by the Act to have such just and reasonable through rates established.

The Rio Grande was entitled, as a matter of law, to have the Commission find that such through routes had been established, and, in passing on whether the defend-

---

[APPELLANTS' NOTE: The language included in brackets is modified by substituted pages 4 and 5 of Appendix E.

ants should be required to establish and maintain future just, reasonable and non-discriminatory competitive joint rates, to have the Commission apply the provisions of § 1(4) and § 3(4) of the Act.

If the Rio Grande, on its showing before the Commission and an application of the provisions of § 1(4) and § 3(4), was entitled to an order requiring the establishment and maintenance of such joint rates for the through routes which we hold had been established, then necessarily the denial of the order prayed for deprived the Rio Grande of a pecuniary gain to which it was entitled. This, because the granting of the relief undoubtedly would have resulted in a large increase of traffic via the Rio Grande and in its operating income, and, no doubt, in its net earnings.[2] More succinctly stated, if the Rio Grande, under the facts established by the evidence before the Commission, and the application of the provisions of § 1(4) and § 3(4) of the Act, was entitled to an order requiring the defendant railroads to establish such joint rates, the denial of that right resulted in pecuniary injury to the Rio Grande.

Where an order of the Commission denies a right given to a carrier by the Act, and the denial of such right adversely affects the revenues of the carrier, causing it to suffer pecuniary injury, such carrier has a right to a judicial review of the order.[3]]

While it is our view that the denial of the relief here challenged will result in pecuniary injury to the

2 The Union Pacific asserts that the granting of the relief prayed for would result in a large loss of traffic and a large reduction of earnings by the Union Pacific.

3 The Chicago Junction Case, 264 U. S. 258, 266, 267.

Rio Grande, we do not think such injury is essential to the right of judicial review. In *Mitchell v. United States*, 313 U. S. 80, Mitchell brought a proceeding before the Commission in which he alleged that the Chicago, Rock Island and Pacific Railway Company, in its purported compliance with an Arkansas statute requiring segregation of the races during transportation did not provide as desirable accommodations for colored as for white passengers traveling in Arkansas over its line, which resulted in unreasonable charges and unjust discrimination against and undue prejudice to colored passengers in violation of §§ 1, 2, 3, and 13 of the Act and the Fourteenth Amendment. The only relief sought was the removal and avoidance in the future of the alleged discrimination and prejudice in the furnishing of accommodations. The Commission, while holding that the matters complained of were prohibited by § 3(1) of the Act, denied the relief prayed for. Mitchell then brought an action in the District Court of the United States for the Northern District of Illinois to set aside the Commission's order. In passing on whether Mitchell had standing to maintain the action, the Supreme Court said, at pages 92 and 93:

> "*First.* The Commission challenges the standing of appellant to bring this suit. We find the objection untenable. This question does not touch the merits of the suit, but merely the authority of the District Court to entertain it. The fact that the Commission's order was one of dismissal of appellant's complaint did not foreclose the right of review. Appellant was an aggrieved party and the negative form of the order is not controlling. Rochester Telephone Corp. v. United States, 307 U. S. 125, 143.
>
> "Nor is it determinative that it does not appear that appellant intends to make a similar rail-

road journey. He is an American citizen free to travel, and he is entitled to go by this particular route whenever he chooses to take it and in that event to have facilities for his journey without any discrimination against him which the Interstate Commerce Act forbids. He presents the question whether the Act does forbid the conduct of which he complains.

"The question of appellant's right to seek review of the Commission's order thus involves the primary question of administrative authority, that is, whether appellant took an appropriate course in seeking a ruling of the Commission. The established function of the Commission gives the answer. The determination whether a discrimination by an interstate carrier is unjust and unlawful necessitates an inquiry into particular facts and the practice of the carrier in a particular relation, and this underlying inquiry is precisely that which the Commission is authorized to make. As to the duty to seek a determination by the Commission in such a case, we do not see that a passenger would be in any better situation than a shipper. Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426; Robinson v. Baltimore & Ohio R. Co., 222 U. S. 506; Mitchell Coal Co. v. Pennsylvania R. Co., 230 U. S. 247; Morrisdale Coal Co. v. Pennsylvania R. Co., 230 U. S. 304; General American Tank Car Corp. v. El Dorado Terminal Co, 308 U. S. 422.

"The District Court had jurisdiction to review the action of the Commission and the question on that review was whether that action was in accordance with the applicable law."

*[There, Mitchell suffered no pecuniary injury, but the court had no difficulty in concluding that he had a right to maintain the proceeding before the Commission,

*APPELLANTS' NOTE: The language included in brackets is modified by substituted page 6 of Appendix E.

that he was an aggrieved party, and that he was entitled to judicial review. See, also, *Henderson v. United States*, 339 U. S. 816, 823.

Here, the Rio Grande sought an order compelling the defendant railroads to perform the duty of establishing just and reasonable joint rates, fares, and charges over through routes, and it was immediately and directly affected and suffered discrimination by the refusal of the Commission to direct the defendant railroads to comply with the statutory mandate.

We think the cases relied on by the defendants are distinguishable.

*Edward Hines Trustees v. United States*, 263 U. S. 143, did hold that in order for the plaintiffs to maintain that action it was necessary for them to show that the order subjected them "to legal injury, actual or threatened," but the complainants there sought the] continuation of a so-called penalty charge of $10 per car per day on lumber held at reconsignment points. The court said that the plaintiffs had no absolute right to require carriers to impose penalty charges and that plaintiffs' right was "limited to protection against unjust discrimination." Here, under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines. In the *Chicago Junction* case, *supra*, the court distinguished between an incident of more effective competition and injury inflicted by denying equality of treatment. Just, reasonable, and non-discriminatory joint rates is the equality of treatment which the Rio Grande here seeks.

In *Alexander Sprunt & Son, Inc. v. United States*, 281 U. S. 249, the Interstate Commerce Commission entered an order directed to the railroads operating in Oklahoma, Arkansas, Texas, and Louisiana, which required them to remove in a prescribed manner, undue prejudice and preference caused by their rates on cotton shipped from interior points to Houston and other ports on the Gulf of Mexico. Two actions were brought, one by Sprunt & Son and one by the Texas & New Orleans Railroad Company and other carriers, to enjoin the enforcement of the order. Upon final hearing, the District Court sustained the validity of the order and entered a decree dismissing the bills. None of the carriers appealed from the decree. Sprunt & Son appealed. The court held that the issue of undue prejudice and unjust preference which had been passed upon by the Commission had become moot, because most of the carriers never sought to annul the order and that the carriers who joined in the suit to set it aside had voluntarily severed themselves from the shipper, who objected to it. With respect to the right of Sprunt & Son to maintain the action, the court at pages 254, 255, said:

> "* * * We are of the opinion that appellants have no standing, in their own right, to make this attack. In so far as the order directs elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents per hundred pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under § 3 of the Interstate Commerce Act. For, their competitive advantage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding. * * * But that interest alone did not give

them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where *a right of his own is alleged to have been violated by the order.* * * * In the case at bar, the appellants have no independent right which is violated by the order to cease and desist. *They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled.* The advantage which the appellants enjoyed under the former tariff was merely an incident of, and hence was dependent upon, the right, if any, of the carriers to maintain that tariff in force and their continuing desire to do so." (Italics ours.)

Here, again, the court recognized that mere deprivation of a competitive advantage was not enough and that they were only entitled to reasonable service at reasonable rates and without unjust discrimination. Here, the very thing the Rio Grande seeks is not a mere competitive advantage, but the establishment of just and reasonable through rates and the removal of unjust discrimination, which will result in pecuniary profit to the Rio Grande and the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings.

In *Pittsburgh & West Virginia Railway Co. v. United States*, 281 U. S. 479, the Commission entered an order authorizing the New York Central Railroad and other rail carriers to join in establishing a union passenger station at Cleveland, through a subsidiary, Cleveland Union Terminals Company. The Wheeling & Lake Erie Rail-

way Company had for some years owned and maintained an independent passenger station at Ontario Street, Cleveland, in the line of the easterly approach to the proposed union terminal. It was apparent that either ownership of or an easement in the Wheeling's site would be indispensable in order to provide the necessary easterly approach to the terminal. Wheeling consented to sell its site and become a tenant in the new terminal. Contracts were made embodying this plan, subject to approval of the Interstate Commerce Commission. Thereupon, Wheeling filed before the Commission two applications for certificates of public convenience and necessity, one permitting it to abandon its Ontario Street station, and the other authorizing it to use the facilities of the union terminal, and pending its completion to use the facilities of the station of the Erie Railroad and the tracks of the Big Four.[4] Pittsburgh & West Virginia Railway, a minority stockholder and connecting carrier of the Wheeling, intervened in opposition to the applications. It opposed them on the ground that the Ontario Street station was ample for both the present and future needs of the Wheeling and that the contracts were disadvantageous to the Wheeling in certain particulars. The Commission found the public convenience and necessity would be served by the granting of both applications and accordingly issued its certificates as prayed for. Pittsburgh & West Virginia Railway then brought an action in the District Court of the United States for the Northern District of Ohio to set aside and annul the order of the Commission. The Supreme Court held that the order did not affect Pittsburgh & West Virginia as a carrier and that the claim that the order threatened Wheeling's

4 Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.

financial stability and Pittsburgh & West Virginia's financial interest as a minority stockholder was not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. The court, at page 487, said: "* * * The injury feared is the indirect harm which may result to every stockholder from harm to the corporation," and that the interest of Pittsburgh & West Virginia was insufficient to give it standing to bring the action.

In *Moffat Tunnel League v. United States*, 289 U. S. 113, the Commission had entered an order authorizing the Denver and Rio Grande Western Railroad Company by stock purchase to acquire control of the Denver and Salt Lake Railway Company, called the Moffat Road. In the proceeding before the Commission the Moffat Tunnel Improvement District and the Public Utilities Commission of Colorado had intervened and they brought an action in the District Court of the United States for the District of Delaware to set aside the Commission's order. In holding that the plaintiffs did not have standing to maintain the suit, the Supreme Court said, at page 119:

> "* * * the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order. Edward Hines Trustees v. United States, 263 U. S. 143, 148. Sprunt & Son v. United States, 281 U. S. 249, 254. Pittsburgh & W. Va. Ry. v. United States, 281 U. S. 479, 486. Plaintiffs have failed to show that they are so qualified. Their interest is not a legal one. It is no more than a sentiment, such as may be entertained by members of the public in the territory west of Craig, that the improvement of transportation facilities authorized by the Commission will lessen the possibility of construction by a rival of the Rio Grande of an extension of the Moffat to Utah common points."

The *Pittsburgh & West Virginia Railway* case and the *Moffat Tunnel League* case are obviously distinguishable from the instant case.

With respect to cases relied on by the defendants, the statement by the court in *Youngstown Sheet & Tube Co. v. United States*, 295 U. S. 476, is apposite. "* * * The authorities cited by the appellees are to be distinguished on the ground that the plaintiffs either had no legal interest or capacity to sue or failed to allege that the rates under attack were *unreasonable or discriminated against them.*" (Italics ours.) Here, the existing rates are attacked by the Rio Grande on the ground that they are unjust, unreasonable, and discriminatory as against the Rio Grande and shippers on its line, deny them equality of treatment, and cause injury to them.

It is urged that to maintain the action, equitable grounds for relief must be alleged. But, it should be remembered that in the *Rochester Telephone* case, the court, at page 142, said:

> "* * * An action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted. An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. Refusal to change an existing situation may, of course, itself be a factor in the Commission's allowable exercise of discretion. In the application of relevant canons of judicial review an order of the Commission directing the adoption of a practice might raise

considerations absent from a situation where the Commission merely allowed such a practice to continue. But this bears on the disposition of a case and should not control jurisdiction. * * *"

Moreover, in overruling *Proctor & Gamble v. United States*, 225 U. S. 282, the court, at page 136, in the *Rochester Telephone* case, *supra*, observed that the shipper in that case "was within the express language of Congress authorizing suits 'to enjoin, set aside, annul, * * * any order of the Interstate Commerce Commission.'"

In the instant case, the Rio Grande, in its complaint, alleges that it was without adequate remedy at law. Clearly, the Rio Grande can maintain no other action which will give it adequate relief or prevent injury to it.

Accordingly, we conclude that the Rio Grande had standing to maintain the action.

---

The order in so far as it denied relief to the Rio Grande will be annulled and set aside and the cause remanded to the Commission for further proceedings in conformity with this opinion.

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 4492

The Denver and Rio Grande Western Railroad Company,
Plaintiff,

v.

United States of America and Interstate Commerce Commission,
Defendants.

Filed Apr 22 1955

*Order*

It is ordered by the court that the opinion heretofore filed herein be modified by substituting for pages 14, 29, 31, 32 and 36 thereof the following pages numbered 14, 29, 31, 32 and 36 and by the changes reflected in such last-mentioned pages:

[Substituted Page]

than over the Rio Grande route. This is due, in part to the refusal of Union Pacific to join with Rio Grande in establishing joint rates with respect to such traffic. The higher rates effectually close the Ogden gateway commercially and enable the Union Pacific to obtain the long haul on such traffic.

The power of the Commission to establish through routes and joint rates under §15(3) is limited by §15(4) of the Act, which declares that, except as provided in §3 of the Act, a railroad may not be required without its consent to embrace in such route substantially less than the entire length of its railroad which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through rate unreasonably long, as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed is needed in order to provide adequate, and more efficient or more economic

[Substituted Page]

II.

The Motion to Dismiss

We have concluded that under the evidence before the Commission the existence of through routes via the Rio Grande was clearly established, as a matter of law, and that the Commission erred, as a matter of law, in not finding the existence of such through routes.

We further conclude that the Commission erred as a matter of law in applying the limitations of §15(4) with respect to the establishment of through routes, in determining whether the Union Pacific and the other defendant railroads should be required to establish and maintain for the future just, reasonable and non-discriminatory competitive joint rates under the provisions of §14(4), §3(4), §15(1) and §15(3).

The duties and powers of the Commission, with respect to the relief sought by the Rio Grande, are clearly provided in §1(4), §3(4), §15(1) and §15(3) of the Act. The right of the Rio Grande to file its complaint with the Commission and seek the relief therein prayed for is clearly given by

[Substituted Page]

equitable divisions thereof, and a removal of the discrimination resulting from the existing through rates, which were a combination of intermediate or local rates, and the denial of such relief was the denial of a right given by the Act to have such just and reasonable through rates established.

The Rio Grande was entitled, as a matter of law, to have the Commission find that such through routes had been established, and, in passing on whether the defendants should be required to establish and maintain future just, reasonable and non-discriminatory competitive joint rates, to have the Commission apply the provisions of §1(4), §3(4), §15(1), and §15(3) of the Act, free of any of the limitations imposed by §15(4) with respect to establishing through routes.

If the Rio Grande, on its showing before the Commission and an application of the provisions of §1(4), §3(4), §15(1) and §15(3), was entitled to an order requiring the establishment and maintenance of such joint rates for the through routes which we hold had been established, then necessarily the denial of the order prayed for deprived the

[Substituted Page]

Rio Grande of a pecuniary gain to which it was entitled. This, because the granting of the relief undoubtedly would have resulted in a large increase of traffic via the Rio Grande and in its operating income, and, no doubt, in its net earnings.[2] More succinctly stated, if the Rio Grande, under the Facts established by the evidence before the Commission, and the application of the provisions of §1(4), §3(4), §15(1) and §15(3) of the Act, was entitled to an order requiring the defendant railroads to establish such joint rates, the denial of that right resulted in pecuniary injury to the Rio Grande.

Where an order of the Commission denies a right given to a carrier by the Act, and the denial of such right adversely affects the revenues of the carrier, causing it to suffer pecuniary injury, such carrier has a right to a judicial review of the order.[3]

2 The Union Pacific asserts that the granting of the relief prayed for would result in a large loss of traffic and a large reduction of earnings by the Union Pacific.

3 The Chicago Junction Case, 264 U. S. 258, 266, 267.

[Substituted Page]

There, Mitchell suffered no pecuniary injury, but the court had no difficulty in concluding that he had a right to maintain the proceeding before the Commission, that he was an aggrieved party, and that he was entitled to judicial review. See, also, *Henderson v. United States*, 339 U. S. 816, 823.

Here, the Rio Grande sought an order compelling the defendant railroads to perform their statutory duty to establish just and reasonable joint rates, fares, and charges over through routes, and if it was entitled to such an order, then it was immediately and directly affected and suffered discrimination by the refusal of the Commission to direct the defendant railroads to comply with the statutory mandate.

We think the cases relied on by the defendants are distinguishable.

*Edward Hines Trustees v. United States*, 263 U. S. 143, did hold that in order for the plaintiffs to maintain that action it was necessary for them to show that the order subjected them "to legal injury, actual or threatened," but the complainants there sought the

(Signed) Royce H. Savage
District Judge

(Signed) William Lee Knous
District Judge

(Signed) Orie L. Phillips
Circuit Judge

## APPENDIX F

*The Pertinent Provisions of the Interstate Commerce Act (United States Code, Title 49), Involved in this Case are as Follows:*

National Transportation Policy—

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1 (4)—

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to

part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3 (4)—

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 15 (1)—

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers sub-

ject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(3)—

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classification, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and mini-

ma, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. * * *"

Section 15 (4)—

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

Section 15(8)—

"In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this part to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this part provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported."

Section 20(11)—(in part)

"That any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, Dis-

trict of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; * * *."